DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
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Digital Broadcast Copy Protection	)	MB Docket No. 02-230
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Comments of the
Home Recording Rights Coalition

I. Introduction

As it proceeds, the Commission should seek to preserve the reasonable, customary, and legitimate expectations of consumers while seeking to balance the incremental demands of copyright proprietors. HRRC and other groups concerned with consumer rights have been assured that the concept of a "flag" aimed at curbing the mass, anonymous redistribution of broadcast content over the Internet, in competition with what broadcasters do, does not arise from concerns over what consumers might do on a customary basis. Nor is it aimed at constraining consumers' own use of their home networks. The question, from HRRC's perspective, is whether, in a climate in which reasonable and customary consumer practices *are* otherwise under assault, the ancillary consequences of a broadcast flag regime are acceptable. The challenge before the Commission is, as the leadership of the House Energy and Commerce Committee made clear in its September 25, 2002, hearing, to preserve consumer expectations while seeking to address the concerns of copyright proprietors.

The Betamax Presumption of Quiet Enjoyment

The HRRC was formed twenty-one years ago on October 22, 1981 -- the day after the U.S. Court of Appeals for the Ninth Circuit classified the distribution of home recording devices as an infringement on the rights of motion picture studios. Less than three years later, the U.S. Supreme Court overturned this decision, holding that, even if a product may have predominantly infringing uses, its distribution to and enjoyment by consumers cannot be enjoined if it also has a commercially significant non-infringing use.* Since that day in 1984, *the presumption has been that consumers are entitled to the 'quiet enjoyment' of consumer electronics and information technology products,* even though these products may potentially be put to uses that a court might find to infringe copyright.

Sony Corp. v. Universal City studios, 464 **U.S. 417 (1984).**

Central to this presumption in favor of consumer enjoyment is the doctrine of "fair use." Given its importance to the lives of the American public, the Commission should keep in mind the historic and current importance of fair use to society as a whole. As Representative Rick Boucher said in announcing introduction of H.R. 5544 in the 107th Congress:

> The Fair Use doctrine was fashioned by the federal courts as a means of furthering the vital free expression values that are given constitutional recognition in the First Amendment. Fair Use is a pressure relief valve on what would otherwise be total monopoly control by the owner of a copyright over the use of the copyrighted material. It permits limited personal non-commercial use of lawfully acquired copyrighted material without the necessity of having to obtain the prior consent of the owner of the copyright.

The fair use doctrine was codified as Section 107 of the Copyright Act, as a limitation on the rights of proprietors. Under the *Betamax* holding, fair use *is* but one of a number of possible substantial uses that may be non-infringing. But fair use, as it explicitly protects conduct that does *not* require the authorization of the proprietor, has been the conceptual bulwark for protecting consumers as technological advances make control over their home conduct increasingly possible.

Attempts To Re-Shape The Balance

In the *Betamax* case, the Supreme Court suggested that if Congress were not happy with the balance identified by the Court, it could legislate to change it. As the transition to digital video approached, congressional leaders, though not seeking to change basic copyright law, called upon the private sector to propose draft legislation that would employ technology to equitably balance concerns over proprietor rights and consumer enjoyment. From 1993 through the Spring of 1996, the HRRC participated in such discussions with the motion picture industry, producing draft legislation known as the "Digital Video Recording Act" ("DVRA"). The DVRA did not seek to rewrite the copyright law. Rather, it envisioned a set of limited technological obligations on devices, to be balanced by "encoding rules" that limit the instances in which performance constraints could be triggered by copyright proprietors. Though the DVRA never became law, its encoding rule framework was enacted as Section 1201(k) of the Digital Millennium Copyright Act ("DMCA"). These encoding rules limit the uses of certain analog "copy control" technology, and thus offer a guarantee that consumers will retain the right to make home copies of broadcast, basic cable, and premium channel programming.

Concerns Over Passive Encoding

One reason the DVRA was not enacted with respect to digital technology was its specification of a simple, "passive" coding technology to identify the intended copy status of programs (copy freely; one generation; no-more copy; never copy). *Enforcement would require a legislative mandate to recognize and respond to such coding,* over a broad range of devices. Representatives of the information technology industry urged that,

rather than travel such a road in the first instance, there should be an exploration of "self-protecting" technologies, possibly involving encryption, the adherence to which could be enforced through licensing of the technical means necessary to acquire the content. Further discussion led the heads of four trade associations,* in 1996, to convene an open, periodic discussion forum, to air proposals for any and all possible technologies, self-enforcing or otherwise -- the *Copy Protection Technical Working Group,* or *CPTWG.*

As the NPRM notes, one version of a "broadcast flag" proposal was brought to the CPTWG, discussed under the auspices of a Work Group, and was the subject of a final report by co-chairs nominated by three of the industries' that had originally formed the CPTWG. In the intervening years between the DVRA proposal and the broadcast flag proposal, regimes involving "self-protecting" technologies,[4] among others, had emerged from discussion at CPTWG and elsewhere and had been offered for license by their developers. While some technologies have been incorporated in media and consumer products, the advent of "self-protection" and licensing has not provided a cure-all for content owners, nor have consumer expectations been clarified in all respects. Nor has the encryption/license approach even been available in the case of free, over-the-air broadcasts. These programs are emitted over the airwaves without encryption or any other means of licensed or conditional "self-protection."

Having explored the "self-protection" route since 1996, the three industries find themselves, again, looking at a "marking" technology that, at least in some instances, would require devices to be under a legal obligation in lieu of or in addition to any imposed by license.[5] And, again, there is concern over possible ancillary or collateral consequences for clearly legitimate products and uses.

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[2] The Consumer Electronics Association (CEA), The Information Technology Industry Council (ITIC), The Motion Picture Association of America (MPAA), and the Recording Industry Association of America (RIAA).

[3] The RIAA did not participate.

[4] More commonly if loosely referred to today as "Digital Rights Management," or "DRM" technologies.

[5] The unencrypted nature of broadcasts is not the only factor here. Technical and legislative discussions about the "analog hole" -- conversion of digital signals to analog where no "self protection" **is** available -- have similarly focused on **use** of passive encoding (*e.g.,* a "watermark"), and a duty mandated on "downstream" devices to respond. These proposals arise even (indeed, especially) where the source signal has been "protected" and licensed in digital format, but such control disappears upon conversion to analog, which is necessary to **serve** consumers' devices and expectations.

HRRC Core Principles

Although a CPTWG participant, HRRC engages as to outcomes only where public policy issues are involved. HRRC begins analysis of such issues, as they emerge, from the following Core Principles:

1. Fair Use remains vital to consumer welfare in the digital age. Consumers should continue to be able to engage in time-shifting, place-shifting, and other private, noncommercial rendering of lawfully obtained music and video content.

2. Products and services with substantial non-infringing uses, including those that enable fair use activities by consumers, should continue to be legal.

3. Home recording practices have nothing to do with commercial retransmission of signals, unauthorized commercial reproduction of content, or other acts of "piracy." Home recording and piracy should not be confused.

4. Any technical constraints imposed on products or consumers by law, license or regulation should be narrowly tailored and construed, should not hinder technological innovation, and may be justified only to the extent that they foster the availability of content to consumers.

It is with reference to the HRRC Core Principles, and the complexities and dangers of mandated solutions, that HRRC answers the questions posed by the Commission.

II. Questions Posed By the Commission

Given the history and challenges described above, it is appropriate for the Commission to begin its process cautiously, through a series of questions. However, the notice asks whether a "regulatory copy protection regime" is needed, and poses other questions that refer to the broadcast flag as a "copy protection" technology. As we note in the Introduction, the "broadcast flag" technology is *not,* and does not involve, a "copy protection" regime. It is not aimed at preventing the consumer from making any home copies whatsoever (though there is concern over projected ancillary effects). It is, rather, a *redistribution* regime that would require a technical mandate to be effective.

A. Is Quality Digital Programming From Terrestrial Broadcasts Being Constrained Due To Internet Redistribution?

It seems unlikely that the prospect of Internet redistribution by consumers has had any significant impact on the quality or quantity of digital or HDTV programming made available thus far by content providers and broadcast terrestrially:

- Programs such as motion pictures reach free broadcast only after passing through a series of "release windows" in which paid services come first.

- Few consumers possess the combination of storage capacity and *upload* bandwidth to set up a server for digital programs of appreciable length.

- According to content industry representatives, motion pictures routinely are copied and placed on the Internet, for viral distribution, *prior to or during their theatrical release periods* -- years before, even under the best of circumstances, they would reach broadcast television.

- Impediments to DTV or HDTV broadcast of sporting events have been related more to audience growth factors, consumer cable compatibility problems in receiving content originated as HDTV broadcasts, and decisions by some television networks not to invest in HDTV at all.[6]

- Given the competition among various media and between five major networks, and the factors cited above, it seems unlikely that attractive programs would be withheld on this basis unless there were some concerted agreement to do so. While HRRC is aware of corporate and industry threats to withhold content, it is not aware of any agreement to do so, and would view any such agreement as a possible violation of antitrust law.

HRRC's negative answer to this initial question does not mean that the inquiry should end here. It is conceivable that circumstances could change, and "legacy" considerations could inhibit action at a later date. The FCC, however, should not base any action on claims of present (or feared future) effects of which there is no persuasive evidence.

B. Rules, Means And Mechanisms Of Implementation

The Commission next asks, essentially, whether the flag regime is 'ready for prime time'; how to resolve outstanding compliance, robustness and enforcement issues; whether there are alternatives; and whether or how to proceed if such a "regime" needs improvement. HRRC is not itself a technology provider (and includes several such providers that compete with each other in the marketplace) so we can address only some of these issues.

The "flag" itself is a simple means to indicate intended status, via "ancillary" data that travels with the signal information but (in contrast to a "watermark") is not hidden in the picture area. It has been subject to

[6] A decision not to invest in HDTV cannot conceivably be tied to concerns over redistribution -- given bandwidth constraints, it seems likely that prior to redistribution, an HDTV signal would be "downres'd" before being offered on a server, so as to cut down on time necessary for transmission.

extensive discussion and documentation on a multi-industry basis by the Advanced Television Systems Committee ("ATSC"). It is well understood to be intended as a marker, indicating whether *redistribution* has not been authorized by the broadcaster. In this capacity it is entitled to substantial credibility.

One possible "alternative" to a regime involving the "flag" would be encryption upon broadcast. HRRC has been and remains opposed to any such regime. First, it would strand the DTV and HDTV broadcast receiver products already in the hands of consumers, and the newer generations now on the way to market. Second, it would make compliance with the FCC "dual tuner" order impossible -- the "BPDG" process itself has shown that any proceeding to choose a single source encryption technology for broadcasts would likely take years. Third, this approach would not avoid the "legacy" issues discussed below. Fourth, after the return of analog spectrum, source encryption of digital broadcasts would remove the last non-licensed alternative for the right to acquire television broadcasts -- crossing a conceptual threshold and undermining the rationale for our unique, national commitment to free, local terrestrial broadcasting.

C. Mandate On Transmissions?

HRRC sees no reason to mandate use of the flag by broadcasters or content providers. In the marketplace today, some content providers seek to forego applying or triggering various content protection technologies, either because they are technically flawed or to avoid costs or licensing payments. They should remain free to do so. Indeed -- as in the case of any mandated regime with the potential to constrain consumers' quiet enjoyment -- use of the flag should be subject to *encoding rules* that *prevent* its application to news and public affairs programming. We discuss this point further below.

D. Mandate On Reception And "Downstream" Devices?

If the Commission or the Congress does decide to proceed, HRRC does not see any alternative to some form of regulatory or legislative mandate. In the absence of source encryption, no licensing regime is of sufficient scope or breadth to impose a duty (directly or indirectly) on all devices capable of retransmission to the Internet.

The means predominantly discussed at the BPDG was to require either recognition at the point of demodulation, *or* treatment of the signal so as to assure it would not be redistributed over the Internet until the flag could be checked and redistribution prevented thereafter, if necessary. The rationale for such an approach was that, if the home network were to be analogized to a funnel, legislative or regulatory device mandates would be minimized if duties originated at the top rather than in the broader area further down.

A disadvantage in concentrating on the top end of the funnel is that if the obligatory response to the flag (or assurance of security until it has been read) involves encryption, encryption has been introduced to the system at a point earlier than otherwise would be necessary for either conditional access

or copy protection purposes.[7] This raises the possibility of ancillary or collateral consequences: even though the encryption and subsequent decryption is not aimed at and ought not interfere with the viewing, recording, and playback of programs in the home network, it could pose an obstacle in certain circumstances. One such circumstance cited was the case of a "legacy" player that might be able to play back a recording made via a newer recording format, were that recording not encrypted. HRRC believes that consequences for legacy devices should be avoided wherever possible. However, the HRRC membership includes competing technologists that do not have uniform views on the prevalence or consequence of such collateral effects, or on the precise expectations of consumers for playback devices that may have been purchased before the encrypted recording format was known to the marketplace. Some also perceive the use of privately developed license restrictions on downstream devices to be a disadvantage, compared to restrictions developed as part of the public policy process; others prefer the application of such license restrictions.

Conversely, disadvantages may also arise if the focus is moved lower down on the "funnel." Such was the nature of the "marking" technology ("Copy Generation Management System," or "CGMS") proposed in the DVRA. In that case, ancillary data was to be read and responded to at the time of recording, and elsewhere. Members of the information technology industry complained that a requirement to search for and respond to such status data would impose burdens on the efficiency of their products; and that in a software environment, the legal mandate necessary to enforce such an obligation would be unreasonably intrusive, and pose possible unintended consequence. Similar concerns were expressed by some participants at BPDG, as well, when possible alternatives to concentrating on the point of demodulation were discussed.

E. Criteria To Evaluate Technologies

Perhaps the most contentious debate in the BPDG concerned the criteria used to determine which protection technologies could be used to output and record digital broadcast content. HRRC applauded the September 18 "Staff Discussion Draft" under consideration by the House Committee on Energy & Commerce for promoting objective technical criteria and possible self certification:

- Technical Criteria. Technical levels of protection should be specified so that any technology company that wishes to compete in the marketplace need only meet clear, well-defined and neutrals criteria. As the staff draft

[7] As the broadcasts are offered freely through advertiser support, they are not subject to conditional access. Nor is there any apparent intention, through the "flag" regime or otherwise, to impose any copy control limit, generational or otherwise, on consumer home recording of free, over the air broadcasts. Such proposals have been made in the past and successfully resisted through objections by HRRC and others.

[8] The extent to which neutral criteria must also be considered "objective" is a highly charged issue among technologists and others. Some take the position that criteria

observed, the criteria should be set only "high enough" to achieve the stated goals of the Broadcast Flag, without unnecessarily burdening product design, manufacture or performance; or stifling innovation into new technologies.

- Self-certification. HRRC agreed with the draft's reliance on manufacturer self-certification, rather than adding some approval step before products can be offered on the open market. Self-certification under "objective" technical criteria should help ensure that new technologies will reach the market without undue delay.

F. Privacy Issues

HRRC is not aware of significant privacy issues, or of First Amendment issues other than those inherent in fair use concerns.

G. Scope And Impact On Consumers

HRRC agrees with the formulation in the Energy & Commerce staff draft that the proper scope of protection should be "to prevent the unauthorized distribution of marked digital terrestrial broadcast television content *to* the public over the Internet." One of HRRC's core concerns is that the flexibility offered by new digital communications technology not be reserved for enjoyment only by content industries. Consumers' quiet enjoyment of digital products should include a reasonable expectation of sending content to second residences, vehicles or close family members. Such practices do not threaten the legitimate marketplace for licensing and syndication of television content.

HRRC also supports the encoding rules provision of the staff draft, which provides that the broadcast flag may not be used "to signal protection for news and public affairs programs (including political debates)." HRRC believes this section should also include educational programs, as well as other programs of which the Commission believes broad redistribution would be in the public interest. Our discussion of the alternatives before the Commission indicates that any implementation is likely to have some collateral consequence. Hence, where there is a strong topical element and the program already has been broadcast freely, the equitable considerations that may justify an imposition on freely marketed products to respect the flag should also justify limitations on its use by the content provider and broadcaster.

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cannot be entirely neutral without taking account of subjective ("marketplace") factors such as the willingness of content providers to rely on a technology for protection. Others argue that any determination that takes any account of such factors cannot be objective. HRRC does not propose or endorse technologies outside of a public policy context ***so*** could not take a position on such a question until *after* the actual public policy consideration on Table A factors has begun. Despite all the BPDG discussion, there is scant record for evaluation in this respect. It is possible, but not certain, that this stage will have been reached in this proceeding once the round of Comments has been complete.

H. Jurisdiction

HRRC believes that a final determination on the Commission's jurisdiction should be based on evaluation of all the Comments and Reply Comments that the Commission will receive, not only on the question of jurisdiction itself, but also substantively. At the heart of a determination of ancillary jurisdiction is a question of factual relationships, and these will be most apparent only after a complete record has been built.

We believe there are clearer cases than presented here for the robust exercise of the FCC's jurisdiction. For example, in the case of "navigation devices,"[9] Congress has passed two laws, the Cable Act of 1992 and Section 304 of the Telecommunications Act of 1996, directing the Commission to take action, and the Commission has acknowledged ongoing jurisdiction to ensure that Congress's intent is implemented successfully. Here, by contrast, there is a strong national policy in favor of a transition to digital broadcasting, but only some of the technical requirements for DTV broadcast signals are spelled out in FCC regulations. There has not been any final congressional action compelling the FCC to enjoin redistribution. Nor is there any existing regulatory framework that would be incomplete without redistribution being enjoined. In such circumstances, the precedent of FCC entry, *sua sponte,* must be of concern to those relying on the doctrine of consumer quiet enjoyment of devices and technology in the home.

HRRC is aware of the importance of congressional interest and oversight, and this factor is also entitled to weight in close cases. HRRC may have more to say on the subject of jurisdiction after evaluating the Comments of other interested and concerned parties on their own understanding of the significance of any Commission action taken with respect to the broadcast flag.

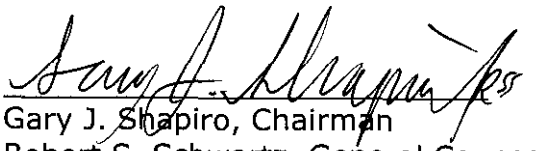
III. Conclusion

The HRRC urges the Commission to give careful attention to reasonable and customary consumer practices and expectations as it evaluates the Comments received in this Docket. While there is not yet persuasive evidence of harm from redistribution by ordinary consumers, there are clear indications that a broadcast flag regime could have ancillary consequences for such consumers.

[9] CS Docket No. 97-80.

Respectfully submitted,

The Home Recording Rights Coalition



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December 6, 2002